23/1/02

IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 222 OF 2001

BETWEEN:

NIKE REAL ESTATE LTD.

Plaintiff

- AND -

(1) LUC DE BRUYNE
(2) CLAUDINE DE CUYPER
(3) INTERNATIONAL RELOCATION GROUP LTD.

Defendants

Appearances:

Diarmad Murray of Walkers for the plaintiff.
Ramon Alberga QC instructed by Linda Dacosta of Myers & Alberga for the 1st & 2nd defendants.
Karin M. Thompson for the 3rd defendant.

Chambers application heard January 9, 2002.

GRAND COURT - CAYMAN ISLANDS

REASONS FOR JUDGMENT (COSTS)

On December 31, 2001 I granted judgment in favour of the plaintiff affirming the rescission of a contract for the purchase by the plaintiff from

the first and second defendants of a commercial property in George Town known as the Sage Building. This result followed a finding that the plaintiff had been induced to enter into the contract of purchase and sale by fraudulent misrepresentations, for which, the third defendant was largely responsible.

The judgment resulted from three applications for summary judgment, one on behalf of the plaintiff, one on behalf of the first and second defendants (the vendors) and one on behalf of the third defendant.

In addition to a declaration that the plaintiffs had properly rescinded the contract, the judgment awards damages against all three of the defendants. During the argument of the applications it became apparent that no useful purpose would be served by a trial of the action and I was invited to dispose of it. The judgment is therefore, by any test, a final judgment.

Consequently, I must now determine the costs issues, that is to say the costs of three interlocutory applications and the costs of the actions.

The plaintiff seeks costs on an indemnity basis and that, not surprisingly, is opposed by the defendants.

THE PLAINTIFF'S POSITION

The plaintiff argues that, as a result of the decision of a majority of the Court of Appeal in *Bonotto et al v Boccaletti et al* (delivered August 24, 2001 and as yet unreported), the Grand Court has jurisdiction to award indemnity costs in appropriate cases. *Bonotto* was a case involving gross frauds which led the trial judge to remark that he would not have hesitated to award indemnity costs had he been of the opinion that he had jurisdiction to do so.

In the Court of Appeal both Rowe J.A. and Taylor J.A. (the majority) took the view that the facts in *Bonotto* disclosed a proper case for indemnity costs if the Grand Court had the jurisdiction to award such costs. The majority judgments are therefore largely devoted to resolving the jurisdictional issue.

Rowe J.A. indicated that if the court had jurisdiction to award costs on a basis other than the standard (party and party) basis the determination as to

how to exercise that jurisdiction was a matter for the exercise of the court's discretion.

Taylor J.A. referred *inter alia* to the language used by Lord Justice Fry in *Andrews v. Barnes* (1888), 39 Ch. D. 133, at p. 138, indicating that "the Court exercised a most wide discretion not only as to the circumstances under which costs were to be awarded, but apparently as to the measure and fullness of the costs". At page 33, Taylor J.A. said:

> " In my view s. 24(2) of the Judicature Law is reasonably capable of being construed as granting to the court an unfettered discretion both as to the award of costs and their amount ..."

Taylor J.A. went on to say that,

> "The discretion as to costs is, of course, to be exercised only in accordance with principles, as established by modern authorities. As is observed in this case by the trial judge, only in most exceptional cases will an award of indemnity costs be made, otherwise than under contract or out of a fund."

Mr. Murray submitted that as the plaintiff was entitled to recover by way of damages all the loss directly caused by entering into the contract it would be

entitled to recover all of its costs of instituting and prosecuting the action as a head of damage. This would lead to the conclusion that if the formal cost award was limited to the standard basis the difference between the accounts recoverable in accordance with the prescribed scale and the amount required to fully indemnify the plaintiff could be recovered as damages.

Unfortunately, as pointed out by the editors of McGregor on Damages (15th edition) pages 433 *et seq.*, the decided cases do not support that submission.

McGregor states (at p. 433)

> "Clearly it would make nonsense of the rules of the court as to the award of costs … if the successful party could recover as damages either the costs withheld by the court or any further costs he has incurred beyond the party and party costs…"

McGregor states flatly that this has never been allowed.

I note however that if the costs sought by way of damages were incurred by the plaintiff in litigation with a third party the position is totally different. (McGregor, p. 439)

I am not sure that the decided cases reflect any logical principle. Rather they seem to reflect circular reasoning. Damages are awarded in order to fully compensate the party entitled thereto. While damage awards are subject to limitations (e.g., some losses are considered to be too remote in law), costs on a party and party scale are limited by statutorily imposed tariffs. Such tariffs stipulate the amounts to be awarded on a "one size fits all" basis, and party and party costs are intended to be a partial indemnity only. Consequently, the principles to be taken into account in assessing damages are not taken into account in awarding costs. However, I am bound to apply the law as it has been laid down by many wise judges over many years.

When it became apparent that the law was clearly against Mr. Murray's proposition he argued that indemnity costs ought to be awarded to the plaintiff in this case because all the plaintiff's losses should in principle be the subject of compensation and as its litigation costs could not be recovered as damages, they were properly recoverable as costs.

In *Bonotto*, Rowe J.A. referred to Halsbury's Laws (4th ed) Vol. 44(1) para. 1442 for the statement that,

> " It is a principle of legal policy that law should be just and fair and that court decisions should further the ends of justice."

I fully appreciate the fact that to a great extent "justice" like beauty is in the eye of the beholder. On the other hand if, as Mr. Murray submits, the plaintiff in the case at bar is entitled to rescission and full compensation for the losses occasioned by the defendants' conduct there is no apparent reason why the plaintiff should suffer a shortfall just because a portion of its loss was due to the need to commence and fund this litigation without which it could not recover any of its losses. Again this reasoning seems to conflict with the spirit of the law as explained by the editors of McGregor. Accordingly, the question is whether or not this is a proper basis for an award of costs on a solicitor and client scale in light of the decided cases in which such awards have been held to be appropriate. That does not appear to be the case.

THE DEFENDANTS' POSITION

While counsel for all of the defendants concede that *Bonotto* has settled the question of jurisdiction, Mr. Alberga and Ms. Thompson argued that indemnity costs should only be awarded in exceptional cases. On behalf of the first and second defendants, Mr. Alberga submitted that an award of solicitor and client costs should be limited to those cases in which it could be said that the party against whom the award is sought has been found to have engaged in conduct amounting to an abuse of the process of the court and conduct which can be regarded as deliberately dishonest. He took the position that a party to a litigious proceeding was entitled to be aggressive in his or her conduct of the case and this could not be characterized as an abuse of process. Mr. Alberga relied *inter alia* on the judgement of Vinelott J. in *Bir v. Sharma*, (the Times Newspaper 7th December 1988, otherwise unreported) in which a Mareva injunction had been granted on the basis of fabricated evidence, that is to say a forged document. It seems to me that *Bir v. Sharma* is very like the *Bonotto* case. *Bir v. Sharma* was followed in *Berkeley Administration Inc. et al v. McClelland et al* [1990] F.S.R. 565. In that case Wright J. remarked that the trial judge "had severely criticized the

plaintiff's two principal witnesses". Indemnity costs against the unsuccessful plaintiff were not awarded. Wright J. said at page 569:

> " Mr. Leaver has urged upon me with great cogency and forcefulness that I ought to draw the conclusion that the contentions put forward on behalf of the plaintiffs and, therefore, no doubt on their instructions were matters in which the plaintiffs themselves could have no genuine belief as to their truth. That may be so, but it seems to me that criticisms of that kind are different in nature from the blatent forgery which was discovered in the *Bir v. Sharma* case, which is overt dishonesty and, indeed, criminality and which undoubtedly led the learned judge in that case to make the order as to costs that he did.
>
> This is of course, a matter for my discretion. It is a discretion which I have to exercise with care, but I have come to the conclusion that it has not been shown to my satisfaction that there is any sound reason for my applying anything other than what might be described as "the ordinary consequences" of failure in hotly contested litigation of this kind."

I must say that it seems to me that Wright J. ought to have decided whether or not the plaintiffs had in fact put forward a case in which they had no genuine belief as to the matters which they urged the court to find to be the truth. I do not think that either the High Court of Justice in England or this Court exists for the purpose of encouraging people to put forward such a case, and if they do I would have thought the charge of abuse of process was

made out at least to the extent necessary to justify an award of indemnity costs.

Mr. Alberga also relied on the judgment of the English Court of Appeal in *Burgess v. Stafford Hotel Ltd.* [1990] 1 W.L.R. 1215 in which a tenant litigating in person launched an appeal from an order terminating his tenancy. The termination was held to be justified under the relevant statute because the landlord had obtained planning permission to demolish the building. By the time the appeal came on for hearing the tenant had obtained counsel.

The Court of Appeal held that the tenant was not entitled to mount a collateral attack on the validity of the planning permission which had to be deemed to be valid unless and until it was set aside in proceedings brought specifically from that purpose. The tenant had also sought to appeal in addition on an issue involving the interpretation of the Rent Act. The tenant advanced one further ground which Glidewell L. J. said "presented on the face of it a little more difficulty" than the other grounds for the appeal, however as this point had not been raised in the Court below the attempt to

raise it on appeal was "properly regarded as an abuse of the process of the court". However Glidewell L. J. acknowledged that as a matter of discretion the Court of Appeal might allow such new points to be taken on appeal and the "abuse" he found seems to have been based on the failure of the tenant to seek the court's leave to argue it.

This suggests to me that conduct which for one purpose may be regarded as an abuse of process would not be so considered so for other purposes; e.g., for the purpose of founding an award of indemnity costs. Glidewell L. J was of the opinion that the tenant should not be penalized for extending his tenancy by launching the appeal which he eventually abandoned on the advice of counsel. The court did not find that the tenant had appealed knowing that the appeal was without merit.

Mr. Alberga also relied upon *Cepheus Shipping Corporation v. Guardian Royal Exchange Assurance plc* [1995] 1 L.L.R. 647.

In that case Mance J. reviewed, *inter alia*, the *Sharma* and *Berkeley* decisions together with *Macmillan v. Bishopsgate* (unreported, 1994) and

Disney v. Plummer (unreported, 1987). In particular Mance J. quoted a passage from Millett J.'s judgment in *Macmillan* as follows:

> "The power to order taxation on an indemnity basis is not confined to cases which have been brought with an ulterior motive or for an improper purpose. Litigants who conduct their cases in bad faith, or as a personal vendetta, or in an improper or oppressive manner, or who cause costs to be incurred irrationally or out of all proportion to what is at stake, may also expect to be ordered to pay costs on an indemnity basis if they lose, and to have part of their costs disallowed if they win. Nor are these necessarily the only situations where the jurisdiction may be exercised; the discretion is not to be fended or circumscribed beyond the requirement that taxation on an indemnity basis must be "appropriate"."

Mance J. then described certain aspects of the conduct of the trial before him. He noted that two witnesses in particular had given "generally unsatisfactory evidence" as to matters that could not have been within their knowledge and which was "heavily shaped by the issues". This problem he said should have been obvious to the unsuccessful plaintiffs before trial.

He concluded that:

> "The case advanced involved at the least a highly opportunist and tactically motivated approach to litigation which was unreasonable, and which this Court should actively discourage."

Indemnity costs were awarded.

Lastly, Mr. Alberga referred to the decision of the Court of Appeal in *Munkenbeck & Marshall (a firm) v. McAlpine* (1995), 44 Con. L.R. 30 Hollis J. (with whom Russel L.J. agreed) quoted a passage from the judgment of Kerr L.J. in *Disney v. Plummer* commenting on the proposition that an award of indemnity costs would only be appropriate in cases in which there had been deception or underhand conduct. Kerr L. J. said

> "I entirely reject that submission. On the contrary, I wholeheartedly agree with the course which the judge took in relation to this ill-advised and, if I may say so, stupidly conducted piece of litigation. It is the sort of robust attitude which should be taken to pieces of litigation of this kind. The defendants still suffer, even when they win. But they should at any rate have been given such assistance as can be provided by the rules. I do not accept, as counsel submitted, that indemnity costs are only appropriate if there is some deception or underhand conduct on the part of the losing party, but not if the litigation is merely fought bitterly or even unreasonably. In the latter type of cases judges can still exercise their discretion under RSC Ord 62, r 3(4)."

Hollis J. concluded that an award of indemnity costs was a matter in each case for the exercise of the judge's discretion.

Based on these authorities, Mr. Alberga contended that an award of solicitor and client costs was inappropriate for the following reasons:

> "(1) There was no overt and deliberate dishonesty in relation to the manner in which the Defence to the Plaintiff's action was conducted by these Defendants.
>
> (2) There was no question of any document in this case being a forgery.
>
> (3) There was no scheme to fabricate evidence.
>
> (4) The First Defendant's evidence as to the circumstances in which he entered into the Rent Reduction Agreement was accepted.
>
> (5) This is not a special case warranting an order against these Defendants for costs on an indemnity basis.
>
> (6) There was no attempt to mislead the Court on the part of these Defendants.
>
> (7) There was no deliberate act of dishonesty in the abuse of Court procedure. The process of the Court was not abuse (sic) in any way by defending the proceedings instituted by the Plaintiff.

(8) There is no question of any criminality involved here.

(9) The Defendants have failed in their Defence in hotly contested proceedings but this fact alone does not warrant the award of costs on an indemnity basis."

Mrs. Thompson advised me that she was adopting and relying on the submissions made by Mr. Alberga which I have summarized.

CONCLUSION

I do not wish to re-iterate my reasons for judgment disposing of the action but it is necessary to refer to some findings which bear directly on the costs question.

I have found that Mr. Jamieson, who is an employee of the third defendant - IRG, made deliberately false representations to Mr. Langer Schroll to induce him to purchase the Sage Building. IRG is responsible in law for that conduct as are the first and second defendants. IRG was their agent.

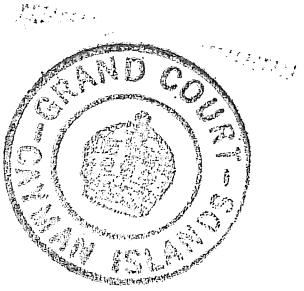
I also found that Mr. Jamieson's evidence was not credible and I have no doubt that he fully and deliberately sought by that evidence to deceive the court on the most fundamental issue in the litigation. Not only did he give deliberately false evidence, the decision to do so was not made at the last minute when, as a witness, he was confronted with difficult questions at the hearing of the summons. His evidence was part and parcel of a scheme which had been thought out and adopted well in advance. I also indicated in my earlier reasons that I did not believe some important aspects of Mr. De Bruyne's evidence. I believe that it is reasonable to conclude that both De Bruyne and Jamieson were well aware that the plaintiff's case was founded on the failure to disclose the existence of the rent reduction agreement and that this failure was significant. Again I have no doubt that both of them were worried that the disclosure of the rent deduction agreement would have caused Mr. Langer Schroll considerable concern and jeopardized their prospects of selling the Sage Building to him or the plaintiff. I have also no doubt that Janieson and De Bruyne discussed the problem this failure to disclose might present to a successful defence of the plaintiff's claim. Jamieson could not have known that De Bruyne intended to "top up" the restaurant rent unless De Bruyne had discussed the problem with him or there were others involved in a conspiracy to deceive the court. That is to

say that Jamieson's knowledge of what De Bruyne proposed to do to remedy the problem came either directly from De Bruyne or from some other person or persons who were involved in thinking about and discussing how this action could be successfully defended. Whether or not others were involved or not, it was clearly De Bruyne's intention to deceive the court. I note here that Jamieson's affidavit was not part of the defendant's original material and was sworn and filed only after I commented that this was a significant omission.

In his affidavit, De Bruyne (a) referred specifically to Jamieson's July 29, 2000 letter to Langer Schroll, (b) swore that he wanted to bring to the court's attention that he thought that Jamieson would have told Langer Schroll about the rent review agreement "if he considered it relevant", and (c) swore that he thought that the rent review agreement would not affect Langer Schroll because it was only for a limited and specific time and no loss would be suffered by him as a result thereof.

I simply cannot believe that on December 3, 2001, when that affidavit was sworn, De Bruyne did not know that neither Jamieson nor anyone else had disclosed the existence of the rent reduction agreement to the prospective

purchaser and it is clear to me that De Bruyne well knew that his problem in this case was not whether or not the rent review agreement might cause the purchaser to suffer a significant financial loss but rather that the non disclosure was very likely to be found to be an inducement to the purchase and therefore lead to a judgment in favour of the plaintiff. That of course has turned out to be the case and I have no difficulty in concluding that all of the defendants should pay all of the plaintiff's costs to be taxed on the indemnity basis.



Kellock, J. (Actg)

Judge of the Grand Court

Dated January 23rd, 2002